IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 922 OF 2001

Babasaheb Ambana Patole,
Prisoner No.C-1454,
Kochapur Central Prison,
Kalamba, Kolhapur. .. APPELLANT

VERSUS

The State of Maharashtra. .. RESPONDENT.

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Shri U.N. Kamble, Advocate appointed for the appellant.
Mrs. V.R. Bhosale, APP for the respondent State.

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CORAM : N.V.DABHOLKAR
AND
SMT.V.K.TAHILRAMANI,JJ.

DATE : 16TH JANUARY 2006

ORAL JUDGMENT :

(PER DABHOLKAR, J.)

1. Appellant / accused who is convicted by Additional Sessions Judge, Sangli at the conclusion of Sessions Case No. 5 of 2000 vide his judgment dated 7.9.2001 and sentenced to suffer life imprisonment, fine Rs.100/-; i/d rigorous imprisonment for 15 days for offence under section 302 of the Indian Penal Code, challenges the said finding of guilty, judgment of

conviction and sentence imposed, by present appeal under section 374 (2) of the Code of Criminal Procedure, 1973.

2. According to the prosecution, the incident in question took place on 11.8.1999 at about 7 a.m. at the house of accused at Jat, District Sangli. The victim in question namely Kalavati was second wife of the accused. According to prosecution, the accused picked up a quarrel with the wife, he struck her in the back by a stone. In order to save herself, victim wife ran inside the house. In fact, initially when she was struck with a stone, she was sitting in front of fire place for the purpose of boiling bathing water. After she ran inside, the accused followed her with a burning fire wood and set her on fire. As her saree caught fire, she ran outside the house when neighbours gathered. They extinguished the fire. She was taken to local Cottage Hospital by the accused himself. Subsequently she expired at Civil Hospital, Sangli on 14.8.1999.

3. The prosecution has examined six witnesses. PW 1 Pappu alias Sidrayya Pachande and PW 2 Algonda Birajdar are the witnesses who are residents of the vicinity. They had reached the location when victim

ran out from the house in a burning condition and they had extinguished the fire. Out of the two, PW 2 Algonda turned hostile and denied any support to the prosecution.

. PW 4 Vijay Dabhole was working as Naib Tahsildar. At the request of the police, he has recorded dying declaration of the victim, which is at Exh.12. The same was recorded at Rural Hospital, Jat on 11.8.1999 between 11.20 to 11.50 a.m. Another dying declaration was recorded by PW 6 Anil Kadam (A.P.I.) This was also at Rural Hospital, Jat. Eventually the time of recording the dying declaration is not endorsed on the document itself but this dying declaration was treated as First Information Report and crime was registered on the basis of the same. From the fact that the crime was registered at 12.35 hours and the Medical Officer has endorsed fitness of the patient to make statement at the foot of this dying declaration at 12.30 noon, it can be presumed that it was recorded soon before 12.30 noon.

. PW 3 Muktabai is mother of the deceased and she is an important witness from prosecution point of view. This is because, according to Muktabai, she visited her

daughter at about 5 p.m. when she received a message about daughter having been admitted in burnt condition. The mother has claimed to have heard the daughter saying that her husband dealt with a stone blow and thereafter ignited her by using a burning fire wood. The remaining witness for the prosecution is Dr. Chandrani Patil (PW 5). She was Medical Officer attached to Jat Rural Hospital at the material time and it is her claim that she has certified fitness of the patient when both the authorities i.e. the Naib Tahsildar and the A.P.I. recorded dying declarations of victim Kalawati wife of Babasaheb Patole.

4. Having gone through the judgment of the Trial Court, it can be seen that the learned Judge had acquitted the accused of the charge under section 498-A of the Indian Penal Code which was additional charge levelled against the accused. The acquittal is followed by the fact that mother in her deposition did not narrate anything which can be termed as ill treatment or cruelty, as contemplated under section 498-A of the Indian Penal Code and as defined in the Explanation to the said section. The only adverse comment the mother offered against son-in-law was that, the accused was addicted to liquor. The State having preferred no

appeal against this acquittal, we are not required to address ourselves to the evidence on record for the purpose of charge under section 498-A of the Indian Penal Code.

5. So far as charge under section 302 of the Indian Penal Code is concerned, the learned Judge by relying upon inquest panchanama and the post mortem notes, which are on record at Exhs. 19 and 20 (both the documents admitted in evidence under section 294 of the Code of Criminal Procedure, 1973 since the genuineness of those was not disputed by the defence), arrived at a conclusion that the death was suffered as a result of burn injuries. The death can be said to be homicidal only when authorship for causing the burn injuries can be attributed to somebody else. The learned Judge has considered the dying declarations as recorded by the Naib Tahsildar and the A.P.I. The dying declaration as recorded by the Naib Tahsildar is believed by the learned Trial Judge inspite of some defects in the same. Eventually it may be stated here itself that the dying declaration as recorded by the Naib Tahsildar and which is at Exh.12, although in the form of question - answer form, does not bear any endorsement by Medical Officer Dr. Chandrani Patil regarding fitness of the patient to

make a statement. Otherwise, the learned counsel for the appellant has not been able to point out any other defect in this dying declaration. So far as dying declaration as recorded by A.P.I. is concerned, if at all; there are two defects in recording the same. Although Dr. Chandrani Patil claimed that she has examined the patient before recording of dying declaration was commenced, she has put endorsement only once and i.e. after conclusion of the dying declaration. Apart from this, the dying declaration recorded by A.P.I. Shri Kadam does not refer the time of commencement and conclusion of the dying declaration.

. It appears that the learned counsel for the appellant before the Trial Court had relied upon the cases which are discussed in para 23, 24 and 25 of the judgment of the Trial Court, **Paparambaka Rosamma Vs. State of Andhra Pradesh (1999 Cr.L.J. 4321)** being the leading case at that time, on the subject of admissibility of dying declarations on record. The ratio laid down by Hon'ble The Supreme Court in the matter of Paparambaka is no more a good law, the same having been over ruled by the decision of the Supreme Court in the matter of **Laxman Vs. State of Maharashtra (AIR 2002 SC 2973).** The Hon'ble Supreme Court in the

matter of Laxman Vs. State observed thus :

> "There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, when evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor, the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful."

. Taking into consideration the law laid down by the Hon’ble the Apex Court, the defect in the certification by the Medical Officer, no longer vitiates the dying declarations. Exh.12, as can be seen; is

recorded in question - answer form and none of the answers appear to be irrelevant. Although the Executive Magistrate / Naib Tahsildar has not deposed in so many words that he has himself ascertained the fitness of the patient to make the statement, the same is obvious from the fact that the questions are answered rationally. So far as the dying declaration as recorded by A.P.I. (Exh.14-A) is concerned, the doctor has certified fitness. The Executive Magistrate has deposed that after recording was completed, the dying declaration was read over to the victim and the same was admitted by the victim, to have been correctly recorded. The dying declaration recorded by A.P.I. concludes with specific endorsement to this effect.

. There are couple of other things which support the possibility of patient being in a condition fit to make the statement. The incident occurred on 11.8.1999 and the patient had survived till 14.8.1999 for three days. The percentage of burn injuries suffered, as can be seen from the post mortem notes, was 71. These details also support the probability that the patient could have been in a state fit to make a statement. We are, therefore, not inclined to accept the submission of learned counsel Shri Kamble that the dying declarations

are unreliable pieces of evidence because of defect regarding endorsement by the Medical Officer.

6. Having gone through the two dying declarations and the deposition of mother Muktabai from where peeps out an oral dying declaration, we are convinced that the three dying declarations are consistent. In both the recorded dying declarations, victim Kalawati has narrated a story that the husband used to pick up frequent quarrels with her by suspecting her character and behaviour and she believed the same to be the cause for the alleged incident. The incident is also narrated in identical fashion in both the dying declarations, to the effect that she was struck in the back by using a stone while she was sitting in front of fire place just outside the house for boiling bathing water and as she ran inside the house, husband followed her with a burning fire wood and ignited her. According to her, after having been set on fire, she ran outside the house when neighbours extinguished the fire. In fact, name of PW 1 Pappu prominently appears in both recorded dying declarations. Inspite of inculpating husband for having set her on fire, Kalawati has also narrated that it was her husband who took her to the hospital. We feel that such a narration on the part of

the victim lends assurance to credibility of the statement and rules out the possibility of implication of the husband as a result of revenge. Advocate Shri Kamble has assailed the dying declaration in two ways. According to him, the fact that the husband took Kalawati to the hospital, speaks against his being the author of burn injuries. No doubt, as argued by Advocate Shri Kamble; ordinary instinct on the part of the wrong doer is to run away but in the cases of bride burning, husband and relatives of the husband accompanying the victim to the hospital is also not rarity. The presence of culprits of bride burning with the victim serves their purpose of keeping the victim tight lipped. We are unable to agree with learned counsel that subsequent conduct of the accused in making medical assistance available to the wife by taking her to rural hospital, is so weighty as to falsify the recorded dying declarations.

7. Advocate Shri Kamble has relied upon admission by Medical Officer Dr. Chandrani Patil to following effect :

"The body of patient was smelling of kerosene."

According to Advocate Shri Kamble, if the body of the patient was smelling of kerosene, the possibility can not be ruled out that Kalawatibai had committed suicide. Except Kalawati being second wife or husband being addicted to liquor, there is no other cause, much less a strong case, probabalised on record for which Kalawati could have committed suicide. So far as admission by Dr. Chandrani Patil is concerned, it must be said that the same is a reckless, irresponsible statement on the part of the doctor. This is because she did not make such an admission by referring to any of the notes. She was summoned to prove fitness of the patient to make the statement when dying declarations were recorded by the authorities. Except endorsement regarding fitness of the patient below dying declaration as recorded by the A.P.I., there was no other document, by relying upon which Dr. Chandrani Patil could have refreshed her memory. Her admission that the body of the patient was smelling of kerosene is not supported either by inquest panchanama or by post mortem notes. We must, therefore, reject the admission by Medical Officer Dr. Chandrani Patil to the effect that the body of the patient was smelling of kerosene, as erroneous and reckless statement. We are, therefore, not inclined to draw inference as desired by learned counsel shri Kamble for

the appellant that there is a possibility of Kalawati having committed suicide. No doubt, had we been inclined to believe this version of Dr. Chandrani, the same was capable of causing considerable damage to the recorded dying declarations by making truthfulness of the version of the deceased doubtful, because in her narration there is no reference of use of kerosene by the accused for the purpose of setting wife Kalawati on fire.

8. Advocate Shri Kamble has placed reliance upon the observations of Hon'ble the Apex Court in the matter of **Smt. Kamla Vs. State of Punjab (AIR 1993 SC 374)** wherein it is observed that if there are more than one dying declarations, they should be consistent particularly in material particulars. In the reported case, the victim had narrated of mother-in-law having sprinkled kerosene from behind and burned the wife. In another dying declaration, she had narrated that her clothes got burned catching fire, thereby suggesting theory of accident. The third dying declaration was vague as to who exactly poured kerosene and set the victim on fire. It must be said that it was in the light of three discrepant dying declarations that the Hon'ble the Apex Court have recorded above observations.

In the matter at hands, having held that three dying declarations provided a consistent story, the case relied upon by the learned counsel renders no help to the appellant accused.

9. **Sukhar Vs. State of Uttar Pradesh (2000 Cri.L.J. 29)** was relied upon by Advocate Shri Kamble for the purpose of observations in para 2 to the effect that statement by the injured to the Investigating Officer and first information report lodged by him, is not admissible as dying declaration under section 32 of the Indian Evidence Act. Suffice it to point out that in the reported matter, it was the case under section 307 of the Indian Penal Code (attempt to commit murder). The maker of the statement and the first informant Nakkal was very much alive and examined as PW 5. It was in those facts and circumstances that the observations are recorded by Hon'ble the Apex Court, which are tried to be relied upon by the learned counsel Shri Kamble. In the matter at hands, the maker of the statement is dead and, therefore, the case relied upon by learned counsel for the appellant and the ratio laid down therein, is not applicable to the matter at hands.

10. Having considered the prosecution

evidence and having taken into consideration the challenges posed by Advocate Shri Kamble for the appellant, we are convinced that the two recorded and one oral dying declaration, as brought on record, are convincing and reliable and, therefore, the Trial Court has committed no error in recording a finding of guilty and suitably sentencing the appellant. The impugned judgment, therefore, calls for no interference.

11. The appeal is dismissed. The impugned judgment and order dated 7th September 2001 passed by the Additional Sessions Judge, Sangli in Sessions Case No. 5 of 2000 is hereby confirmed.

. Registrar (Judicial) shall ensure that a certified copy of this judgment is furnished to the appellant, free of costs; through prison authorities.

. Advocate Shri Kamble was appointed to conduct the appeal on behalf of the prisoner at the costs of the State. We quantify his professional charges at Rs.2,500/-.

(SMT.V.K.TAHILRAMANI,J.) **(N.V.DABHOLKAR,J.)**

January 16, 2006.

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